

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA170/2009
[2009] NZCA 450**

THE QUEEN

v

RAYMOND EVEREST HESSELL

Hearing: 13 August 2009

Court: William Young P, Chambers, O'Regan, Robertson and Arnold JJ

Counsel: P J Boylan for Appellant
C L Mander and J Murdoch for Crown
D J Boldt as counsel assisting the Court

Judgment: 2 October 2009 at 10 am

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Chambers J)

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PART 1: GUILTY PLEAS GUIDELINE

Discordant appellate approach to guilty pleas

0 This court has long recognised that a plea of guilty should be a factor in a defendant's favour on sentencing. For instance, in *R v Taylor* [1968] NZLR 981 at 987, this court quoted with approval the statement of Edmund-Davies LJ in *R v de Haan* [1968] 2 QB 108 at 111 that "a confession of guilt should tell in favour of an accused person, for that is clearly in the public interest". This court in *R v Ripia* [1985] 1 NZLR 122 spoke, perhaps for the first time, of the need to recognise a "discount" for a plea of guilty: at 128. Traditionally there was no firm rule as to the manner in which a sentencing judge was to take a plea of guilty into account. It depended on the circumstances of the particular case: *R v Amoroa* CA284/90 15 March 1991. Indeed, as late as 2000, in *R v Mako* [2000] 2 NZLR 170, this court said at [14] that it had "resisted laying down any specific quantum or proportion for such discount because of the widely varying circumstances in which [a guilty plea] might be entered".

1 This court's traditional approach to how guilty pleas should be treated was symptomatic of the courts' general approach to sentencing, with judges vested with broad discretions. Particularly since the passage of the New Zealand Bill of Rights Act 1990, however, such unfettered discretions have increasingly been viewed as unfair. In the case of guilty pleas, it was being asked, on appeals and elsewhere, whether it is fair if offender A is sentenced by a judge who believes in tiny discounts for guilty pleas while offender B, guilty of like offending, is lucky enough to be sentenced by a judge with a generous view. The passage of the Sentencing Act 2002, with its insistence on a highly structured approach to sentencing, signalled the need to review unfettered discretions and effectively rendered the traditional approach to guilty pleas untenable. In particular, s 8(e) of that Act established as a fundamental principle of sentencing that like cases must be treated alike, so far as possible, and s 9(2)(b) identified a guilty plea as a discrete mitigating factor.

2 From about 2005, this court has edged towards more definitive "guidelines" as to how sentencing judges should recognise guilty pleas. A major influence behind this change in approach was not only the statutes mentioned above but also the work of the new (as it then was) Sentencing Guidelines Council in the United Kingdom. One of that council's first guidelines, published in December 2004, was a guideline on "Reduction in Sentence for a Guilty Plea". The intention of that guideline was "to promote consistency in sentencing by providing clarity for courts, court users and victims so that everyone knows exactly what to expect". Prior to that guideline, as the Sentencing Guidelines Council noted, there had been different understandings of the purpose of the reduction and the extent of any reduction given.

3 The English approach was based on a sliding scale. The earlier the guilty plea was entered, the greater the discount given. The reason why an early guilty plea attracted the biggest discount (one-third) was that it shortened the gap between charge and sentence, saved the State considerable cost, and saved victims and witnesses from the concern about having to give evidence. This court began increasingly to take note of the English approach as set out in the guideline, and its successor guideline promulgated in July 2007, and to apply a sliding scale. (The cases do not need citation here: some of the cases are collected in Hall *Hall's Sentencing* (looseleaf ed) at [I.7.3(b)].) Increasingly, sentencing judges adopted the

sliding scale. But none of these appellate cases was or purported to be a guideline judgment and all of them sat rather uneasily with the earlier authority of this court to the effect that the discretion to recognise guilty pleas as a mitigating factor is largely unfettered.

4 The discordance in appellate approach was unfortunate. We would have grappled with the problem earlier had it not seemed likely that the problem would be solved in another way. In 2007, the then Government decided to create a Sentencing Council, whose function was to draft sentencing guidelines on the English model. The Sentencing Council Act was passed later that year. The council has not been established, however, as the present Government does not support the concept of a non-judicial body fixing sentencing guidelines. This court earlier this year resolved that we would resume our programme of preparing guideline judgments. We also recognised that a guideline on discounts for guilty pleas should be one of the first to be tackled. A Full Court was appointed and a suitable case for the exercise selected. We appreciate that the process this court has to adopt in order to prepare guideline judgments is far from perfect. We are conscious, for instance, that we are not able to expose draft guidelines for comment. But, despite those imperfections, we are frequently told, both by trial judges and by lawyers, that guideline judgments greatly assist them in fulfilling their respective roles.

5 There is a need to resolve the conflict in approach between the earlier Court of Appeal authorities and the more recent ones and to set out a clear approach for the future, which will enable defence lawyers to advise their clients with some certainty as to the favourable consequences to them of a plea of guilty, and in particular an early plea. This guideline will assist in achieving greater consistency in sentencing where a guilty plea is a factor, as required by s 8(e) of the Sentencing Act. As this court said in another guideline case, *R v Taueki* [2005] 3 NZLR 372 at [10], this guideline is not intended to “override the discretion of sentencing judges, but rather provides guidance in the manner of the exercise of that discretion”.

The format of this judgment

6 In anticipation of the Sentencing Council Act coming into force, the Law Commission established a Sentencing Establishment Unit, the members of which included judges and criminological experts. The intention was that the unit would prepare for the incoming council a draft set of sentencing guidelines. Much work was done in that regard. Drafts were prepared and consulted upon, on a confidential basis. One of those drafts was the Guilty Pleas Guideline (Gen-10, July 2008).

7 At our request, the Law Commission provided us with the latest draft of their guilty pleas guideline. We in turn provided that to counsel in this case. We also gave them the definitive English guideline. The New Zealand draft guideline adopts the same methodology as the English guideline; the differences between them are largely matters of detail.

8 We heard submissions on the two guidelines and on other jurisdictions' approaches from Mr Boylan, for the appellant, and Mr Mander, for the Crown. We also appointed counsel to assist the court. We are most grateful to Mr Boldt for the admirable way in which he fulfilled his brief.

9 As it happens, all counsel essentially agree with the approach advocated by the Law Commission. (Strictly the draft guideline is the Sentencing Establishment Unit's draft guideline, but it is simpler to refer to the work as the Law Commission's.) We too are satisfied that the Law Commission's approach is the most desirable. It builds on the English guideline and the New Zealand appellate authorities which had cautiously started to follow it.

10 Part 1 of this judgment is the guideline. In addition, we explain why some suggestions made by one or more counsel have not been adopted and why, on some matters of detail, we have differed from the Law Commission.

11 Part 2 of this judgment is concerned with the appellant's appeal against sentence. It is likely to be of interest only to the parties concerned.

The justification for a reduction

12 Section 9(2)(b) of the Sentencing Act states that, in sentencing or otherwise dealing with an offender, the court must take into account whether and when the offender pleaded guilty. A guilty plea justifies a reduction in an otherwise appropriate sentence for three reasons. First, it relieves victims and witnesses of the trauma, stress, and inconvenience that is caused by a delay in resolving the case and by the trial itself, particularly the need to give evidence. Secondly, it avoids the need for a trial, with the attendant advantages of a reduction in court delays and cost savings. Thirdly, it generally indicates a degree of remorse. At the very least, it represents an acceptance of responsibility for the offending.

Overall approach

13 As previously stated, we have decided that the appropriate approach is to build on the English guideline and the New Zealand appellate authorities which had cautiously started to follow it. There is a strong public interest in the discount for guilty pleas being predictable. For that reason, we recommend to trial judges, as a general practice, that they recognise the guilty plea by giving a discrete reduction to what the sentence would otherwise have been, such reduction to be calculated as a proportion of the total sentence that would otherwise be imposed. The extent of the reduction should depend on the stage in the proceedings at which a guilty plea is entered or at which the offender expresses a willingness to enter a guilty plea to the offence for which he or she is later convicted. The reduction should be made as the final step in the sentencing process; that is, after the appropriate sentence has been determined with reference to aggravating and mitigating factors relating to the offence and aggravating and all other mitigating factors relating to the offender.

14 The amount of the reduction is determined according to a sliding scale, with three benchmarks on that scale as follows:

First reasonable opportunity

- A 33% reduction ($\frac{1}{3}$) if the guilty plea is entered, or the willingness to plead guilty is communicated, at the first reasonable opportunity;

At status hearing or first callover

- A 20% reduction ($\frac{1}{5}$) if the guilty plea is entered, or the willingness to enter a guilty plea is communicated, at a status hearing or equivalent stage of proceedings in summary cases, or at first callover after committal in cases proceeding by way of indictment;

Three weeks before trial or hearing

- A 10% reduction ($\frac{1}{10}$) if the guilty plea is entered, or the willingness to enter a guilty plea is communicated, three weeks before the commencement of the trial or hearing.

15 These percentages are not intended to be precise. The judge may use some “rounding” (for example, of months) to achieve a sentence that is workable.

16 Because reductions are made on a sliding scale, a guilty plea entered in the period between the first reasonable opportunity and the status hearing or first callover warrants a reduction of between 20% and 33%. Similarly, a guilty plea entered between a status hearing or first callover and the date three weeks before trial or hearing warrants a reduction of between 10% and 20%. The extent of the reduction depends on the stage at which the plea was entered and the degree to which the plea prevented further trauma, stress, and inconvenience for victims and witnesses and saved resources.

17 A small reduction of less than 10% may be warranted if a guilty plea is entered after the commencement of the trial or hearing. This depends on the stage at which the plea is entered and the extent to which it relieves victims and witnesses of the need to give evidence. A guilty plea at the conclusion of the prosecution case does not warrant any reduction.

18 In pronouncing the sentence, the judge should state both the sentence that would have been imposed if there had been no reduction as a result of the guilty plea, and the amount or nature of the reduction made. If a judge, in the exercise of his or her discretion, chooses not to follow this guideline, he or she should give reasons for the deviation.

19 We explain in more detail below certain aspects of this guideline and elaborate on the types of case to which it applies.

Guilty plea as a discrete factor

20 A discount for a guilty plea is to be seen as a discrete mitigating factor. That is consistent with s 9(2)(b) of the Sentencing Act. The discount is provided as the final step in the sentencing process.

21 In adopting that view, we have followed the approach of the United Kingdom's Sentencing Guidelines Council and the Law Commission's draft. This approach will be familiar to most trial judges, as it was recommended by this court in a number of recent judgments: see, for example, *R v Fonotia* [2007] 3 NZLR 338 at [50]-[51] and *R v Walker* [2009] NZCA 56 at [18]-[20]. Those judges accustomed to bundling all mitigating factors together will need to change their practice. The suggestion in *Taueki* at [44] that the discount for an early guilty plea should be "from the starting point" should now be read subject to this guideline.

22 We note, however, one exception to the general principle. That is with respect to the discount traditionally given in cases where a defendant has not only pleaded guilty but also provided or promised to provide considerable assistance to the police with respect to co-offenders. In those circumstances, courts have tended to amalgamate those discounts. For instance, in *R v Hadfield* CA337/06 14 December 2006, this court suggested that up to a 60% discount might be appropriate in cases where a defendant entered a guilty plea at the first reasonable opportunity and rendered or promised to render considerable assistance to the police with respect to co-offenders. We confirm that approach. It should be noted, however, that a 60% discount will be warranted only where the guilty plea is at the first reasonable opportunity and the assistance to the authorities is substantial. If the guilty plea is late, then the reduction will be correspondingly reduced. Similarly, if the assistance to the authorities is not particularly significant, the reduction will be reduced.

Remorse

23 The Law Commission proposed that “genuine remorse” should be a separate mitigating factor. That is contrary to well-established authority in this court. For instance, in *R v Accused* (CA430/96) (1997) 14 CRNZ 645, this court described at 647 the entry of an early guilty plea as “the most compelling evidence of acceptance of responsibility, remorse and contrition”. In *R v Wilson* [2008] NZCA 496, this court observed at [14]:

It is obvious that the emotion of remorse is generally inherent within a plea of guilty. It does not normally justify a discrete allowance as a stand-alone factor.

24 And to similar effect in *Walker* at [15]:

A discount for remorse is, to some extent, automatically built in as part of the discount for a guilty plea. A guilty plea is, after all, viewed by the courts as an acknowledgement of wrongdoing by the offender, possibly a first step on the road to rehabilitation. Only exceptional steps displaying remorse justify a further discount.

25 Mr Mander supported the Law Commission’s approach; Mr Boldt submitted we should stick with current practice. We accept Mr Boldt’s submission for the reasons he gave.

26 First, if we accept non-exceptional remorse as justifying a discrete discount, we will find every defendant pleading guilty claiming to be remorseful. It will be difficult for sentencing judges to gainsay claims of remorse in these circumstances. A rigid demarcation between guilty pleas and remorse as mitigating factors could lead to discount creep: instead of the discounts being 10-20-33, they might start to become, as a general rule, 15-25-38.

27 Secondly, having a general rule that the discount for a guilty plea incorporates remorse (if any) will ensure greater predictability as to the extent of the discount, which is a fundamental motivation behind this guideline and its English counterpart. At the same time, we acknowledge that exceptional remorse, demonstrated in a practical and material way, can attract its own reward.

First reasonable opportunity

28 The concept of having to enter a guilty plea at “the first reasonable opportunity” to attract the largest discount is not new. The first reasonable opportunity for the offender to plead guilty will generally be at his or her second appearance, as defined in paragraphs 4(b) and 5(b) of the Chief District Court Judge’s Practice Note, Committal Procedure in the District Court, dated June 2009. By that time, initial disclosure, as due pursuant to s 12(4) of the Criminal Disclosure Act 2008, should have been made and the offender should have arranged legal representation. If either of those steps has not taken place, the judge may be justified in considering a later time as the first reasonable opportunity to plead guilty.

29 Many defendants, especially in summary cases, plead guilty on their first appearance. Nothing we say should discourage such early pleas. These defendants will be entitled to the maximum discount. Extending “first reasonable opportunity” to the second appearance will or should not cause any change of behaviour with respect to those defendants who want to make a clean breast of things at their first appearance, with a view to getting everything wrapped up on the one occasion.

30 Three matters are important. First, the date of “first reasonable opportunity” will not be extended on the basis that:

1. the defendant was disputing the prosecution’s summary of facts; or
2. plea bargaining was underway; or
3. the defendant was engaged in challenging the admissibility of evidence;
or
4. the defendant was waiting to see what line co-accused would take or what the outcome might be of discussions or negotiations between the prosecution and co-accused; or
5. the defendant was awaiting a sentencing indication.

31 We are aware that all these factors have been advanced as reasons why what has been on its face a late plea should nonetheless be treated as a plea made at the first

reasonable opportunity. First reasonable opportunity means what it says. The maximum discount is appropriate only for those who are prepared to acknowledge their guilt at the outset. Those who would prefer to wait until they have full disclosure or have tested the admissibility of Crown evidence are fully entitled to stand on their rights. But they cannot expect the maximum discount if they do, as by asserting those rights they have effectively denied the State and their victims the full advantages an early guilty plea brings to them.

32 Secondly, it is often the case that a defendant, while willing to plead guilty, disputes some aspects of the summary of facts. The correct course in those circumstances is to enter the plea of guilty. The summary of facts can then be the subject of negotiation. By the time of sentencing, there will often be an amended agreed summary of facts, on which the sentencing exercise will then proceed. If ultimately the prosecution and the defence cannot agree a summary of facts, then s 24 of the Sentencing Act provides a mechanism for resolving the facts in dispute. There can be consequences, of course, for an unreasonable use of the s 24 procedure: see below at 46-47.

33 Thirdly, the date of “first reasonable opportunity” may need to be extended in circumstances where a question has arisen as to the defendant’s fitness to stand trial and the procedure set out in Subpart 1 of Part 2 of the Criminal Procedure (Mentally Impaired Persons) Act 2003 has been triggered. In those cases, a defendant should not have time running against him or her until a judge has pronounced the defendant fit to stand trial.

Reduction where the prosecution case is strong

34 The Law Commission proposed that the proportionate reduction for a guilty plea should apply regardless of the strength of the prosecution case.

35 Mr Mander did not take a stance on this issue, although he did note that the Law Commission’s suggestion was contrary to what he said was the position reached by the New South Wales Court of Criminal Appeal in its guideline judgment, *R v Thomson* (2000) 49 NSWLR 383 and to the Sentencing Guidelines Council’s

ultimate decision in its revised July 2007 guideline. The Sentencing Guidelines Council's revised position is as follows:

- 5.3 Where the prosecution case is overwhelming, it may not be appropriate to give the full reduction that would otherwise be given. Whilst there is a presumption in favour of the full reduction being given where a plea has been indicated at the first reasonable opportunity, the fact that the prosecution case is overwhelming without relying on admissions from the defendant may be a reason justifying departure from the guideline.
- 5.4 Where a court is satisfied that a lower reduction should be given for this reason, a recommended reduction of 20% is likely to be appropriate where the guilty plea was indicated at the first reasonable opportunity.

36 Mr Boldt urged us to adhere to the Law Commission's stance.

37 We accept that submission. It is very important that defence lawyers and their clients should be able to rely on a predictable discount. It is also important that the guideline be easy to use in busy list courts. Judging the strength of the prosecution's case is often fraught with difficulty. Requiring the sentencing judge to adjudicate on competing claims as to the strength of the prosecution's case and as to the extent to which the defendant's post-offence actions might have contributed to that strength could potentially require significant State and judicial resources, which could be much more profitably utilised on other endeavours. Introducing this qualification to the stepped discounts would lead to unnecessary complexity and rob the guideline of much of its utilitarian value.

38 We have therefore decided that the strength or weakness of the prosecution case is irrelevant for the purposes of calculating the appropriate discount. The sliding scale set out above therefore applies to all cases equally, regardless of whether conviction was inevitable or the defendant had an arguable case to run at trial.

Willingness to plead guilty

39 The critical issue in determining the amount of the reduction is whether the defendant had clearly demonstrated a willingness, at a particular stage of the proceedings, to plead guilty to the charge of which he or she was eventually convicted. Therefore, the offender should not be disadvantaged by the fact that the prosecution chose to proceed to trial on a more serious charge that resulted in an acquittal.

40 As a matter of general principle, an offender who is convicted of an offence for which he or she had earlier communicated a willingness to plead guilty should receive the maximum reduction available at the stage of proceedings at which that willingness was communicated. For example, if an offender charged with murder communicated at the first reasonable opportunity that he or she was willing to plead guilty to manslaughter, but the prosecution chose to proceed to trial on the murder charge, the offender should receive the maximum reduction for the plea if subsequently convicted of manslaughter.

41 In giving that example, we are not suggesting the Crown should have accepted the guilty plea to manslaughter. The Crown will often be fully justified in proceeding with a murder charge, even though the defendant indicates a willingness to plead to manslaughter and manslaughter is the jury's ultimate verdict. The reason, in these circumstances, the defendant should be treated as having pleaded guilty to manslaughter at the first reasonable opportunity is that the defendant did all he or she could to acknowledge responsibility at the earliest time; it is only fair that he or she should get the maximum discount. Giving that defendant the maximum discount does not in any way indicate that the prosecution's stance in pursuing the murder charge was wrong.

42 What we have just set out is not new. Since this court tentatively started using the English approach of a sliding scale dependent on when the defendant pleaded guilty or indicated a willingness to plead guilty to a specified offence, we have had defendants arguing that, although, say, a guilty plea was not entered until the week before trial, defence counsel had broached that possibility with the officer-in-charge

or Crown counsel at the time of the preliminary hearing. Frequently at sentencing this has led to dispute, as Crown counsel appearing at sentencing has known nothing about the alleged earlier indication of a willingness to plead guilty. It can all be rather unseemly, with assertion and counter-assertion from the bar. To overcome this, we strongly recommend that, if an offender does not wish to plead guilty to the offence with which he or she is charged but is prepared to plead guilty to a lesser (specified) offence, he or she should communicate that willingness *in writing* to the prosecutor, with a copy to the court. There will then be no dispute as to the defendant's stance and when that stance was adopted.

43 If the charge is amended after a not guilty plea was entered, the reduction for a subsequent plea must be calculated with reference to the time then taken by the offender to enter a guilty plea. For example, if on the morning of a trial, one charge is substituted with another and the offender immediately pleaded guilty, he or she should receive the full benefit of a guilty plea at the first reasonable opportunity.

Factors that may change the calculation

44 In the general run of cases, the reduction may be smaller if:

- (a) the judge is satisfied that a not guilty plea was entered and maintained for tactical reasons (for example, in the hope that one or more witnesses might become unavailable to give evidence, or to postpone the serving of a custodial sentence);
- (b) the offender prolonged proceedings before entering the plea (for example, by failing to appear for scheduled court appearances);
- (c) the complainant or other witnesses were required to give evidence in person at a committal hearing or at a hearing under section 344A of the Crimes Act 1961.

45 There is one other situation where a smaller reduction might be justified. This will arise in certain circumstances where a disputed facts hearing under s 24 of the

Sentencing Act is required. As a general rule, a defendant who pleads guilty even though, at that time, the summary of facts on which the sentencing will proceed has not been agreed has nothing to fear. The Sentencing Act provides a mechanism for resolving disputed facts. In so far as alleged facts might count against a defendant, the prosecutor must prove such facts, in the absence of agreement, beyond a reasonable doubt: see s 24(2)(c). In general, a defendant's insistence on a disputed facts hearing will not count against him or her for the purposes of a guilty plea discount, provided his or her stance has been reasonable.

46 If, however, the defendant adopts an unreasonable stance, propounding a view of the facts the s 24 judge completely or largely rejects, then a sentencing judge should re-evaluate whether the standard guilty plea discount remains appropriate. It will not be appropriate, for instance, if the s 24 hearing effectively turns into a mini-trial which the defendant "loses". Then there will have been little or no saving in costs to the State. As well, victims and other witnesses will still have had the stress of giving evidence.

47 In circumstances where the s 24 judge considers the defendant has adopted an unreasonable stance, the judge should re-evaluate the discount taking into account the extent to which the case was delayed by the need for a disputed facts hearing, the length of the hearing itself, and the number of witnesses that had to be called, including whether any victim was required to give evidence.

Sentences and orders to which the reduction applies

48 Subject to what we say at 50 below, the guilty plea should be recognised in setting the amount of a fine, or the length of a community-based sentence, sentence of home detention, or sentence of imprisonment.

49 The proportionate reduction for a guilty plea can be readily made when imprisonment is being imposed, since it can be calculated as a percentage reduction in the sentence that would otherwise be appropriate. A percentage reduction may also be appropriate if a non-custodial sentence such as home detention, community detention, community work, or a fine is the otherwise appropriate sentence.

50 The guilty plea may also affect the length of an order disqualifying the offender from driving. Subject to the statutory minimum disqualification period, the plea can be recognised in the length of the disqualification, the amount of any other part of the sentence, or both. It is a matter for the judge's discretion to determine how to achieve the appropriate proportionate reduction according to the timing of the plea.

51 Sometimes it may be appropriate to recognise a guilty plea by imposing one type of sentence rather than another. For example, if an offence otherwise warrants a short term of imprisonment, it may be appropriate to reduce the sentence below the imprisonment threshold to a sentence of home detention or community detention in order to give the guilty plea appropriate recognition. It may also be appropriate to impose a single sentence instead of a combination of sentences (for example, supervision instead of supervision and community work). In cases such as this, a percentage reduction is not possible. The type and length of sentence that gives appropriate effect to the sliding scale set out above is a matter of judgement.

52 A reduction to recognise a guilty plea is not necessarily appropriate if the rehabilitative sentences of supervision or intensive supervision are being imposed. A sentence of this type may be preferred to a more severe sentence solely because of the offender's rehabilitative prospects, and a particular length may be required to enable the effective implementation of special conditions (such as residence in a drug treatment facility or attendance at a programme for sex offenders). In these instances, a reduction is not appropriate.

53 The guilty plea does not affect the imposition or amount of a sentence of reparation, because that sentence is designed to provide redress for the loss, damage, or harm suffered by the victim.

Sexual offending

54 We raised with counsel whether guilty pleas in cases of sexual offending should be treated more favourably than guilty pleas in other cases. This was not an idea suggested by the Law Commission; nor is it a feature of the English guidelines.

55 Our thinking was that trials for sex offending are, in general, harrowing for complainants, who have to relive the crime and who are often exposed to prolonged questioning about very intimate matters. Child sex abuse victims are in an even worse position than adult victims. Conviction rates are low. A defendant who spares a complainant the rigours of a trial should perhaps reap a bigger discount.

56 In the end, however, we have rejected the notion that guilty pleas in cases of sexual offending should be treated as a separate category.

57 First, if pleading guilty to sex offending was to reap an additional discount, that would potentially lift the discount to, say, 40% for a plea at the first reasonable opportunity. We think that is just too high. There is a risk that sentences might become so low that they fail to meet some of the purposes of sentencing, including the need to hold the offender accountable for harm done to the victim and the community by the offending, the need to deter the offender or other persons from committing the same or a similar offence, and the need to protect the community from the offender: see Sentencing Act, s 7(1)(a), (f) and (g). The alternative would be to leave the 10-20-33 scale for sex offenders and have a reduced scale for other offenders. The problem with that is that late pleas for non-sexual offending would reap little reward.

58 Secondly, there would be uncertainty where a defendant was charged with both sex offending and non-sex offending: which scale would prevail?

59 Thirdly, other offending can also be extremely stressful for victims and complainants: for example, cases of blackmail, manslaughter, and domestic violence.

60 Fourthly, introducing separate categories leads to complexity. One of the aims of this guideline is certainty and predictability, with fine-tuning reduced to a minimum.

61 We make one final observation, however. Late pleas attract a discount of up to 10%. In sex cases, we would envisage that even a late plea, on the eve of trial, should attract the maximum 10% discount, as sparing complainants the ordeal of a trial is very much to be encouraged.

Murder

62 How to deal with guilty pleas in murder cases has special difficulties. The issue is not the headline sentence: it is almost invariably life imprisonment: see s 102(1). Another sentence may be imposed only if life imprisonment “would be manifestly unjust”, given “the circumstances of the offence and the offender”. It would be almost inconceivable that a guilty plea on its own could render life imprisonment “manifestly unjust”, although potentially a guilty plea, when combined with other factors, could render life imprisonment manifestly unjust. This guideline does not purport to speak to that unusual circumstance.

63 Where life imprisonment is imposed, the court must order the offender to serve a minimum period of imprisonment (MPI), which cannot be less than ten years: see s 103. There is no discretion to sentence below that figure.

64 Murders with certain characteristics, which are defined in s 104, require MPIs of at least 17 years, unless the court is satisfied that it would be “manifestly unjust” to require the offender to serve that amount of time. These sections have proved difficult to interpret, as is perhaps best shown by this court’s decision in *R v Williams* [2005] 2 NZLR 506.

65 The Law Commission, in its initial consultation draft of October 2007, discussed three options in relation to MPIs attaching to a life sentence:

1. take no account of a guilty plea;
2. apply the guilty plea guideline to MPIs in a modified form;
3. apply the full guilty plea guideline to MPIs.

4. The Law Commission rejected the first two options and tentatively approved the third. It is noteworthy, however, that what it finally came up with in its July 2008 guideline did not follow exactly any of the three options suggested in the consultation draft. Its recommendation, which we adopt, leaves the matter very much to the discretion of the sentencing court:

It is desirable to recognise a guilty plea when setting a minimum period of imprisonment in conjunction with a life sentence for murder or with preventive detention. Where murder is concerned, for example, a policy of not recognising a plea provides little incentive for offenders to plead guilty and may therefore result in delays in disposing of murder cases and an increase in trauma, stress, and inconvenience for the families of murder victims. While [the] guideline may help to determine the appropriate reduction as applied to a minimum period of imprisonment, the amount of reduction is at the judge's discretion.

66 The Law Commission did acknowledge that it is clearly desirable to recognise a guilty plea when setting an MPI. That is non-controversial and is fully consistent with *Williams*: at [72]. But how that is to be done should very much depend on the facts of the particular case.

67 Several matters are clear. If a particular murder warrants a ten year MPI, a guilty plea cannot reduce that MPI: the legislation prevents it. While it might be somewhat unfortunate that co-offenders, one of whom pleads not guilty, the other of whom pleads guilty, may both end up with ten year MPIs for the crime, we do not consider this outcome does necessarily send the wrong message to those facing murder charges. That is because, in the nature of things, no one charged with murder can be certain that he or she will get an MPI of only ten years. The two co-offenders just postulated may have been lucky to strike a judge who chose a ten year MPI instead of, say, a 12 year MPI. Had the judge selected the latter (based on sentencing levels in like cases), the offender who pleaded guilty would have reaped a benefit from it. By pleading guilty he made more certain that he would be at the low end of the available sentencing range.

68 Secondly, it is clear that the standard guideline cannot be applied in unmodified form in murder cases. As Mr Boldt submitted, “it would severely undermine the policy underpinning s 104 if offenders could reduce a 17 year MPI to 11 years simply by pleading guilty”. He submitted it was important that relativity between

murders to which s 104 applies and murders warranting the normal ten year MPI be maintained. We agree. At the same time, we think it arguable that some of the discounts that have been given – which tend to have been in the range of one to two years – have been too light.

69 Mr Boldt did suggest another option: a modified form of the guideline. He suggested that the first ten years of the MPI should be treated as a statutory minimum which must remain unaffected by any other factor, including the defendant's plea. The guideline could then be applied to the "discretionary" component of the MPI – that is, anything above ten years – in the usual way. Under this formula, a 13 year MPI would be reduced to 12 years if the defendant pleaded guilty at the first reasonable opportunity. A standard 17 year MPI would fall by two years four months – to 14 years eight months – if the offender chose to plead guilty at the first reasonable opportunity. It would be "manifestly unjust", in s 104 terms, were such an offender not to be given credit for his or her early guilty plea. This is certainly worth consideration.

70 Another approach worthy of consideration is that adopted by the United Kingdom's Sentencing Guidelines Council. Their guideline provides that, in cases where it is appropriate to reduce the minimum term having regard to a plea of guilty, there should be a sliding scale based on the timing of the plea. The maximum reduction, for an early plea, would result in a reduction not to exceed one-sixth of the otherwise appropriate minimum term, with a maximum discount of five years. A late guilty plea attracts a 5% discount. Having applied the scale, however, the court is still required to review the sentence "to ensure that the minimum term accurately reflects the seriousness of the offence taking account of the statutory starting point, all aggravating and mitigating factors and any guilty plea entered": see the revised Definitive Guideline, para 6.6.

71 We have decided to adopt the Law Commission's recommendation, quoted at 651.1.1.4 above. We regret at this stage we cannot be more definitive. We can indicate that High Court judges should not regard *Williams* as the last word on the appropriate interpretation of ss 103 and 104. We are aware that even experienced High Court judges have found *Williams* difficult to apply: see, for instance,

comments made in *R v DFL* HC AK CRI-2004-44-8643 13 June 2006 and *R v Tamatea* HC PN CRI-2007-054-3683 24 October 2008 at [21], footnote 8. It was decided, of course, in a context where there were no definitive guidelines for guilty plea discounts in non-murder cases, let alone in murder cases. Trial judges may find helpful Mr Boldt's suggestion – at 69 above – and the United Kingdom's Sentencing Guideline Council's approach, although the latter is premised on a significantly different statutory framework for murder sentencing from the one we have. In short, this part of the guideline should be regarded as unfinished business.

Application of this guideline

72 The content of this guideline does not differ significantly from what many sentencing judges have been doing in reliance on more recent appellate authority. The new guideline should be applied to all sentencing taking place from tomorrow on. That was the approach this court took in *Taueki*: at [60]. To assist trial judges and counsel, a copy of this judgment is being emailed to all trial judges, Crown Solicitors, the New Zealand Law Society, and the Criminal Bar Association today.

73 In those cases, however, where sentencing indications have been given and relied on by defendants, sentencing judges should adhere to those indications rather than follow the guideline, unless the guideline yields a more favourable result than the indication.

74 With respect to appeals filed relating to sentences imposed up to today's date, we shall continue to apply the law as set out in previous appellate authorities.

PART 2: THE APPEAL

Approach

75 Raymond Hessel has appealed against his sentence of two years eight months' imprisonment imposed for nine offences of sexual conduct with two girls, one (A) aged 14, the other (B) aged 15, contrary to s 134(1) of the Crimes Act 1961. Part of his complaint is that the sentencing judge, Heath J, failed to give a sufficient discount for the guilty pleas he entered. We deal with Mr Hessel's appeal on the basis of the law as it stood at the time of his offending, not on the basis of the guideline set out above. This is the approach the court has adopted when delivering earlier guideline judgments: see, for instance, *R v Mako* [2000] 2 NZLR 170 at [21] and *Taueki* at [62].

The nature of the appeal

76 The facts of the case are slightly unusual. We provide the following summary, taken from the agreed statement of facts. Unfortunately, some parts of the agreed statement are expressed in the passive form, which renders it unclear as to whether certain acts were done or initiated by Mr Hessel, his co-offender, or indeed the complainants. In this summary, we refer to Mr Hessel's co-offender as "the mother" as she was the mother of A. To reveal her name would potentially disclose to some readers A's identity.

77 On the afternoon of 22 September 2007, Mr Hessel visited the mother at her home. A and B were present.

78 From early afternoon, the mother supplied both girls with alcohol. They became extremely intoxicated. A pornographic DVD titled "Cute Little Teen Lesbians" was played in the living room for A and B to watch. While they were watching, Mr Hessel and the mother went into the mother's bedroom where they began having consensual sexual relations.

79 The girls became curious about what was happening in the room next door and went to see what was going on. The entrance to the bedroom had no door and was closed off only with a curtain. The two girls, both very drunk, stood and peeped through the curtain at Mr Hessell and the mother, who were both still engaged in sexual intercourse. Mr Hessell and the mother noticed the girls at the curtain. The mother invited them into the room. They went in and sat on chairs in the room. Mr Hessell and the mother then resumed having sexual intercourse while the girls watched and commented. The mother asked the girls whether they had enjoyed the porn movie. The girls answered that it was boring.

80 The girls then went into the bathroom. They returned to the bedroom with towels wrapped around their waists and their tops on. The mother took B by her hand and sat her down on the bed. The mother then opened B's towel and proceeded to perform oral sex on her.

81 While this was going on, Mr Hessell proceeded to perform oral sex on A while she performed oral sex on him. He also penetrated A's vagina with his fingers.

82 After a time, Mr Hessell went and joined the mother and B. He then proceeded to give oral sex to both A and B alternately. He also, with his fingers, penetrated both girls' vaginas.

83 After a time, the sexual activities came to an end. There was a discussion about keeping quiet about what had happened. Everyone then went into the living room. A discussion ensued about the fact that, during the escapade, Mr Hessell had lost the ability to keep an erection. Mr Hessell then proceeded to masturbate himself in front of the mother and the two girls. He still was unable to get an erection and went into the bedroom. B followed him in. B tried to help Mr Hessell get an erection by touching his penis.

84 When spoken to by the police, Mr Hessell admitted knowing that the girls were under age. He thought they were both 15; in fact, A was only 14.

85 Both Mr Hessel and the mother were charged. The mother pleaded guilty first. She was sentenced on a different agreed statement of facts from those applicable to Mr Hessel. Potter J sentenced the mother on 9 October last year to 12 months' home detention, subject to a number of conditions. In addition, Potter J imposed on the mother standard conditions under s 14(1) of the Parole Act 2002 for a period of six months following the expiry of the sentence of home detention.

86 Mr Hessel's trial was due to commence on 8 December last year. On 5 December he pleaded guilty. Heath J sentenced Mr Hessel on 6 March this year: HC AK CRI 2007-004-21910.

87 Heath J adopted a starting point (including aggravating factors relating to the offending) of three years, the same starting point Potter J had adopted when sentencing the mother: at [34]-[36]. His Honour then added one month for the "personal aggravating factor" that Mr Hessel had been smoking methamphetamine on the day of the offending and for the fact he had convictions "between 1973 and 2005 involving drugs (one of which involves supply of methamphetamine)": at [37]. His Honour then allowed "a credit in the region of 10%" for the late guilty pleas: at [42]. That resulted in an end sentence of two years eight months' imprisonment.

88 The judge then turned to consider whether home detention should be ordered. Even though the end sentence was more than two years' imprisonment, Mr Hessel was potentially eligible for home detention, his offending having fallen within the transitional period: at [44]. See further *R v Hill* [2008] 2 NZLR 381 (CA). The judge concluded a sentence of home detention "would not respond adequately to the nature and extent of [Mr Hessel's] offending" and would not "provide adequately for the interests of the victims": at [47].

Issues on the appeal

89 Mr Boylan did not challenge the judge's starting point. He did challenge, however, the discount the judge gave in respect of the guilty pleas. He submitted the discount for them and for Mr Hessel's remorse should have been greater. That is the first issue.

90 The second issue is whether the judge was wrong not to impose a sentence of home detention, in light of the requirement under the Sentencing Act for “the least restrictive outcome that is appropriate in the circumstances”: see s 8(g).

91 The third issue is whether the sentence was manifestly unjust compared with the mother’s.

Discount for the guilty pleas

92 Mr Boylan submitted that the circumstances of this case were “special”, a fact Heath J failed to recognise. What made the case “special” was the significant alteration in the agreed facts which shifted “primary offender status from the appellant”. The judge, in allowing only a 10% discount for the guilty pleas, had adopted “a pedantic view”.

93 We cannot accept that submission. Mr Hessel and the mother were arrested and charged on 3 October 2007. Initially, both were charged with sexual violations by unlawful sexual connection. The preliminary hearing took place on 9 April last year. Both were committed for trial. An amended indictment, changing the charges from sexual violation to unlawful sexual connection with a young person, was filed on 28 May last year. The mother immediately pleaded guilty to the counts on which she was charged. Mr Hessel, however, maintained his not guilty stance. As previously noted, he did not change that stance until the last working day before the trial was due to commence.

94 In light of the authorities as they stood at the date of this offending, the mother could expect to be treated as having entered her pleas at the first reasonable opportunity after the charges were reduced. Mr Hessel’s pleas, on the other hand, were truly on the eve of trial.

95 Mr Boylan submitted in effect that the Crown’s late acceptance of changes to the summary of facts somehow justified Mr Hessel not having pleaded guilty earlier. We do not agree. It is true that the agreed summary of facts differs from the original summary in a number of details, but the essential allegations remain the same. By

no stretch of the imagination did Mr Hessel become the subsidiary offender on the amended summary; both Mr Hessel and the mother acted appallingly. Heath J was correct to view them as essentially equally culpable.

96 In any event, after the amended indictment was filed, there was nothing to stop Mr Hessel immediately pleading guilty, as the mother did, and then negotiating with the Crown over the summary of facts. Ultimately, if there had been a dispute the Crown and Mr Hessel could not resolve, a s 24 hearing could have been conducted.

97 The judge's discount was in line with existing appellate authority and cannot be faulted.

Home detention

98 We intend to consider this issue separately from the issue as to disparity with the mother's sentence. What Heath J was required to do was sentence Mr Hessel on the basis of his agreed facts, his pre-sentence report, the victim impact statements relating to him, and the submissions made about him by his counsel and Crown counsel. It was only at the end of that exercise that it behoved the judge to look sideways at what Potter J had done with respect to the mother, so as to make sure that any disparity in the two sentences could be justified. That is how Heath J approached his task.

99 Mr Boylan, in attacking the judge's decision not to impose a sentence of home detention, focused almost exclusively on the fact that the mother had been sentenced to home detention. That is not the issue on this ground of appeal. That is a question we explore in the next section of these reasons.

100 Had Mr Hessel committed his offending a fortnight later, home detention would have been out of the question. That is because, the transitional period having expired (which it did on 1 October 2007), the court has jurisdiction to impose a sentence of home detention only if it would otherwise have sentenced the offender to a short-term sentence of imprisonment (two years or less): see the Sentencing Act, s 15A(1). While the two year cut-off did not apply to Mr Hessel, this court has held

that, the higher the prison sentence would have been above two years, the less likely it is that home detention will be appropriate as an alternative sentence. A sentencing court must keep in mind the general legislative intention behind the sentence of home detention and Parliament's restriction of the availability of that sentence to those whose nominal term of imprisonment does not exceed two years: see *R v Maikuku* [2008] NZCA 552 at [19] and *R v Fanguna* [2009] NZCA 316 at [39]. Two years eight months' imprisonment would have to be right at the edge.

101 Ignoring for the moment the sentence imposed on the mother, we are quite satisfied that Heath J was justified in concluding that a sentence of home detention would not respond adequately to the nature and extent of Mr Hessell's offending and would not provide adequately for the interests of the victims. The victim impact statements made by A and B show clearly this offending had a very pronounced effect on both girls. Indeed, one even attempted suicide.

102 This ground of appeal fails.

Disparity with the mother's sentence

103 Mr Boylan submitted that Mr Hessell's sentence was so much more severe than the mother's that "a reasonably minded independent observer aware of all the circumstances of the offence and of the offenders would think that something had gone wrong with the administration of justice": see *R v Lawson* [1982] 2 NZLR 219 at 223 (CA).

104 In order to analyse whether this long-established test for appellate intervention is triggered, we must carefully consider how Potter J reached the conclusion she did. As we have already noted, Potter J adopted a starting point (including aggravating factors relating to the offending) of three years. She then allowed a 45% discount (20 months) for the following factors taken together:

1. the guilty pleas entered as soon as the amended indictment was filed;

2. the full confession, which included a signed brief of evidence and a willingness to give evidence against Mr Hessel;
3. the profound remorse the mother felt for what she had done to her daughter and B;
4. the positive steps the mother had taken to address the causes of her offending, which were essentially drug-related. In this regard, she had sought the assistance of specialist therapists and had had a preliminary interview for admission to the SAFE programme;
5. the mother was effectively a first-time offender, having only one previous conviction, which was for driving with excess breath alcohol.

105 That brought her sentence to 20 months' imprisonment, well within the normal range where home detention is seriously considered. The judge noted that the mother had already served approximately five months in custody before bail was granted in May 2008. She also took note of the personal efforts the mother had undertaken on her own initiative to address the causes of her offending and the favourable home detention report. The judge decided a sentence of home detention was appropriate. She imposed the maximum length – 12 months. She considered the mother would be able to complete the SAFE programme (if finally she was assessed as suitable for it) during the sentence of home detention. (The SAFE programme takes about a year.)

106 In addition, the judge noted that the standard conditions under s 14(1) of the Parole Act, which would run for a period of six months following the expiry of the sentence of home detention, would mean the mother continued to be subject to “a level of supervision”, which would help ensure she obtained the maximum benefit from the SAFE programme or alternative counselling during her sentence of home detention.

107 In short, therefore, the mother will end up having served five months in prison, 12 months of home detention, and a period of supervision for six months

after that. That is to be contrasted with Mr Hessel's two years eight months' imprisonment, in respect of which he will be eligible for parole after ten months.

108 Viewed in that light, there is very little disparity between the ultimate sentences. Of course, his is more severe, but not by as much as might at first blush appear.

109 What disparity there is is entirely justified. Mr Hessel had none of the five mitigating factors to which the mother could claim credit, and no other ones to compensate. All he had was a very late plea of guilty, for which he got an appropriate 10% discount. The factors which persuaded Potter J to sentence the mother to home detention did not apply in his case.

110 This case does not come close to meeting the *Lawson* test. What disparity there is between the two sentences was entirely justified.

Result

111 All grounds of appeal have failed. We dismiss Mr Hessel's appeal.

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